BRIEF

STATEMENT OF FACTS

The statement of facts which are deemed material to the issue are set forth in appellant's accompanying brief in support of a motion for remanding of record.

ASSIGNMENT OF ERRORS

The Court of Claims erred—

1. In failing to find that there was a taking of appellant's property within the meaning of the Constitution.

2. In rendering a judgment against the appellant and in favor of the United States.

3. In failing to render a judgment in favor of the appellant.

4. In adjudicating the claim case under the common law rule governing percolating waters, whereas the principles of law involved are those governing watercourse waters.

5. In failing to find material facts which were established by evidence and which are proper to be considered if the case comes within the rule governing watercourse waters.

6. In failing to find that certain contract set forth in finding of fact No. 9 was a *nudum pactum*.

7. In basing its conclusion as to the value of the appellant's property which was taken upon incompetent evidence and ignoring established facts to the contrary.

ARGUMENT

The Court below made no attempt to determine whether the destruction of the value of the property of the appellant was the direct result of the actions of the defendant complained of, and even refused to find as a fact that water when moving underground obeys the laws of gravity, though that fact was not only established in evidence, but both parties requested the Court to find it as a fact.

Appellant claims that it has not had an adjudication of its case because of a fundamental error in law by the Court below, and that error consisted in adjudicating the case under the common law rule that Courts will not take cognizance of the consequences of the diversion or interception of percolating waters even though it be to another's injury. The reason of that common law rule is that the origin, movement and course of such waters, prior to any action of any party, is involved in uncertainty, and it would be difficult to administer any legal rules in respect to them. Thus the opinion of the Court below is based on the assumption that "it is not known how underground waters are governed, how they move underground." (Finding of Fact

No. 5, transcript, p. 8) * * * *"the principles applicable to surface waters do not pertain to underground waters, which have no certain course or defined limits"* * * * Percolating water is a hidden invisible thing. How it moves is more a matter of conjecture than knowledge —of inference rather than proof. It would seem impossible to apply any law, beyond the general principle of reasonable use of one's land to such a hidden, formless thing. It seems, therefore, that the existence, origin, movement and course of underground waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be practically impossible. * * * It seems to us that while the property of the plaintiff may have been destroyed by the irrigation system of the Government, yet the influences which have brought about this destruction are so secret, changeable and uncontrollable that we cannot subject them to the regulations of law, nor build upon them a system of rules as has been done with streams upon the surface. * * * From the very nature of the case, and the character of the movement of underground water, we conclude that the property of the plaintiff was not destroyed by a direct invasion." (Transcript pp. 13, 14.)

We maintain that there is no evidence in the record to support such a holding. So far as the

* Italics ours.

evidence is concerned we submit that it is directly contrary to the evidence and to the facts established in evidence.

Appellant maintains that this case does not involve a question of the rights or obligations of parties with respect to percolating waters and that the rule which should be applied is that governing water-course waters. If the Court had adjudicated the case under the principles of law which are applicable, the findings of fact would have been very different, for the court could not then have ignored all evidence tending to show the existence, origin, movements and course of the waters which caused the destruction of the value of the appellant's property. Surely the fact is patent upon its very face that at least one fact was established by appellant showing some relation between the flooding of appellant's land and the fact that several large canals of the appellee were constructed within two miles of the appellant's property, practically surrounding it at a higher altitude than appellant's property and within an area in which the drainage was to appellant's property. *The findings of fact do not show how close some of these canals approached the property of appellant, but the findings of fact are to the effect that there were at least three of such canals practically surrounding appellant's property within a radius of two miles, and that a large quantity of water was transported through said canals.* Will this Court believe that the appel-

lant did not establish as a fact that some water seeped from said canals? Yet the Court refused to find that as a fact. The appellant in this case, in support of its motion to remand the record, has referred to a mass of uncontradicted evidence all going to show that the taking of the appellant's property was the direct result of the operation of appellee's irrigation project. Will this Court believe that the appellant and appellee could both have agreed upon a finding of fact which was not established in evidence, or that the appellee would have asked for a finding of fact to the following effect:

"IX.

"That the seepage from the Government canals caused ridges of ground water to form directly under such canals (694, 698, 700, 840, testimony), and such ridges restrained seepage from the Carson River and from irrigated lands under the project from entering the Soda Lakes area, which otherwise would have entered the area. (694, 698, 700, and 847, testimony; 680, Lee-Clark report.)

"X.

"That because seepage into the ground water from the Carson River and irrigated lands caused a general rise in such ground water, a backwater effect was produced against the ridges formed by seepage under the Govern-

ment canals, forcing considerable of such canal seepage into the lakes area which otherwise would have moved outside of said area. (699, 844, testimony; 680, 684, Lee-Clark report.)"

(See Defendant's objections, &c., p. 1119.)

Yet, as quoted on page 5 of appellant's motion to remand the record in this case, we refer to such a requested finding of fact submitted by the appellee. Attention is particularly invited to a requested finding of fact by the appellant which was concurred in with unimportant modifications by appellee, on pages 17 to 19 of appellant's brief in support of the motion to remand.

Counsel for appellee, in his brief, correctly states that we declined "to produce Hamlet without the character of Hamlet." We are entitled to have Hamlet in the play. We believe that it is the purpose of this Court to do justice between the parties and that we are entitled to have the Court of Claims find the ultimate fact, whether the rise of waters in Big Soda Lake, which destroyed the value of the appellant's property, was, or was not, caused by the operation of the Government's irrigation project, or else that that court shall certify to this Court the circumstantial facts which will enable this Court to determine the issue upon all of the facts established in evidence. The Court below refuse and decline to find any of the circumstantial facts which were established in evidence, for

instance (even those agreed upon by both parties), which went to show whether or not the excess waters entering Big Soda Lake came from the irrigation canals of the irrigation project, or to find the ultimate fact, whether or not the destruction of the value of appellant's property was the result of the operation of the said irrigation project. If the Court had been in doubt as to any point it could have directed the taking of more evidence.

It is respectfully submitted that the Court made a fundamental error in considering that this case presented only the question of the *rights* of parties respecting percolating waters. The defendant brought into Carson River Valley an immense amount of *surface* water from the Truckee River, and transported it at the surface in its ditches to the immediate neighborhood of the claimant's land. As a direct result of the action of the defendant, some of this *surface* water so transported has flooded the claimant's land and destroyed its value. It is immaterial whether the water entered the claimant's land by overflow from the defendant's ditches or by seeping from the ditches through the ground. It is not the medium through which the water travels that determines the question of liability, and it is immaterial whether the course of the water in traveling from the ditches to the claimant's land was observable, or hidden and unobserved, so long as the result is certain. Such

was the decision of this Court upon the demurrer in this case.

The present decision, however, seems to hold that an individual (and therefore the government) is not liable for flooding the lands of another providing there is no negligence and providing that the excess water accomplishes the damage by seepage underground and not by seepage overflow.

We respectfully request the Court to reconsider this case in the light of other adjudications by various courts, of cases involving questions which are also presented in the case at bar.

We respectfully contend that the observations in the decision quoted from Angel on Watercourses and Weill on Waterrights are not now authoritative, and that those quoted from the decision of the Supreme Court in the case of Kansas vs. Colorado must be modified in view of the recent growth of knowledge regarding irrigation, drainage and underground waters, and the recent decisions of the courts upon questions involving those subjects.

The Court is requested to again consider the facts in this case with reference to their relation to the facts in the cases of Bedford vs. U. S. (192 U. S. 217) and Jackson vs. U. S. (230 U. S. 1).

In both of those cases the Court held that the action of the government complained of was merely the restraining of natural forces from changing the conditions then existing, whereas in this case, as in the Lynch, Cress, and Kelly cases, the action complained of was an alteration of natural conditions then existing.

In the Bedford case the Court held that it was the change in the course of the Mississippi River which caused the injury complained of and that that change was due entirely to natural causes. The river, because of its change of course, was a destructive force, eroding and overflowing land, and the action of the government complained of tended to interrupt the further change in the course of the river and keep the course of the river as it then was. It was the continuation of the natural condition as it then was that caused the lands in controversy to be eroded; whereas, in this case the actions of the government complained of changed natural conditions, introduced new and foreign elements, and the new and altered condition produced the injury. If in the Bedford case it had been held that the action of the government had caused the Mississippi River to change its course, then the two cases would have been more nearly parallel, but upon the facts as presented, there is a wide difference between the two cases.

In the Jackson case the alleged injury resulted from the failure of governmental, state and sub-

ordinate agencies (including action of the claimants) to completely remedy a destructive natural condition. Floods of the Mississippi River were overflowing and destroying abutting property. The claimant and others had attempted by the construction of levees to keep the river within its banks. The levees which the claimant had constructed for the protection of his own land were rendered ineffective by other constructions by other persons and the government, for the protection of other land and in aid of navigation. In other words that was a case in which natural conditions were required to be changed to prevent destruction, and the claimant complained because the government had done, for the protection of other lands, the same thing that he had done for the protection of his own lands. If in the Jackson case it had been held that the government had been responsible for the floods then the two cases would have been somewhat similar, but we submit that the facts in the Jackson case and the case at bar are so dissimilar that there is no analogy between them.

The case at bar is much more similar to the cases of Lynah vs. U. S. (188 U. S. 445), Kelly vs. U. S. and Cress vs. U. S. (243 U. S. 316), upon which we rely, and to which we again most earnestly ask the attention of the Court, because they seem to us controlling, and that the Court has erred in holding that the Bedford and Jackson cases control instead of the Lynah case, as it held in the decision upon the demurrer herein.

Appellee contends that appellant is estopped from claiming any damage on account of injury sustained by the operation of the Government's irrigation project because it had made a contract (and deed in pursuance thereof) in consideration of "the benefits to be hereafter derived from the construction of irrigation works through or in the vicinity of the lands hereinafter described."

The court failed to find that *any benefits* whatsoever were derived from any construction by the defendant, and appellant showed that instead of the promised "benefits" the appellee proceeded to destroy the value of all of the appellant's properties which were to have been benefited. What, then, was the consideration for the deed? Surely, promised benefits never received are not a good consideration.

Respectfully submitted,

FRANK S. BRIGHT,

H. STANLEY HINRICHS,

Attorneys for Appellant.

SUBJECT INDEX

TABLE OF CASES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 247

NATRON SODA COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S MOTION FOR REMANDING OF RECORD.

Now comes the appellant, and moves the Court to remand the record in this case to the Court of Claims with instructions to find and certify to this Court, as matters of fact, in addition to those found and certified in said record:

1. Whether percolating waters are governed by the same hydraulic laws as surface waters, and move underground through the interstices between the particles of sand, clay and other character of soil immediately below the surface of the earth, and through cracks and crevices, between such impervious strata as exist, and along a plane known as the ground-water level.

Whether the law of gravitation, the sizes of the

crevices and the frictional resistance caused by the particles around which the water must pass are dominating factors in determining the movement of said underground waters, and position and direction of the ground-water level.

Whether, in the immediate vicinity of Big and Little Soda Lakes, in what is termed the drainage area of the Soda Lakes, consisting of about 4,500 acres, there is a localized water slope from all sides into the lakes, owing to the fact that the water level of said lakes (due to evaporation) is lower than the surrounding ground water level.

And whether the movement of these ground waters is more rapid than is the general movement northeasterly.

2. Whether there are about 10 miles of canals of the Carson-Truckee Project within the said drainage area of the Soda Lakes, and the said canals practically surround Big Soda Lake within said drainage area, and a part of the water passing through the said canals seep into the said drainage area therefrom.

3. Whether the evidence shows the claimant or its predecessors in interest received any consideration for the contract to convey, or for the deed conveying, the right of way for the canals of the Carson-Truckee Project over its lands, or derived any benefit from the construction of said Project.

4. What was the estimated content of the sodium-carbonate in the waters of Big Soda Lake in tons before the claimant and its predecessors in interest commenced their operations, and what is the estimated quantity of said mineral recovered from said lake by the claimant and its predecessors in interest.

5. What was the cost of recovering said mineral

content from Big Soda Lake and manufacturing sodium-carbonate therefrom and transportation to market in 1906 and 1907, per ton, and the sale price per ton during the same period.

6. What was the estimated capacity of the claimant's plant in tons per annum, and whether a new carbonating process had been perfected shortly before the destruction of plaintiff's plant, whereby production was capable of being greatly increased.

7. What is the estimated re-production cost of plaintiff's plant and what was the cost of the said plant, and what is the estimated value thereof at the time of its destruction?

8. Whether there are any other facts established in evidence which are deemed competent and material in determining what is the market value of the property of plaintiff which was taken, and if so, to set forth the said facts; and if any of said facts relate to a compromise settlement between joint owners or partners, all of the circumstances of said settlement should be set forth.

The first of the above requested additional findings of fact is considered by the appellant to be necessary and material to enable this Court to decide justly whether appellant's property was taken by the Government's irrigation project. It is considered that the said facts were established in evidence, and there was no conflict in the testimony as to any of them. Indeed the identical language has been adopted which was embodied in a requested amendment offered by the Government to a finding requested by the claimant in the Court below. It is therefore of facts admitted by the Government. Said finding was refused by the Court below because of a fundamental error as to the rule of

law which should be applied in adjudicating the case. The Court erroneously ignored all facts (even those admitted by both parties) relating to the seepage or movement of underground waters into Big Soda Lake, because of the common law rule as to percolating waters, whereas the said common law rule has no application to this case.

The second requested additional finding of fact is considered by the appellant necessary and material for the same reasons as above, and there is no conflict of evidence as to said facts. Indeed the boundaries of the said drainage area and the position of the canals of the Government's irrigation project with reference thereto are graphically shown on maps introduced into evidence by both parties. (See Claimant's Exhibit Forbes, Nos. 2 and 3; Defendant's Exhibit No. 1, Plate III; Defendant's Exhibit Clark No. 2.) Not only so, but the Government in the Court below requested additional findings of fact as follows:

"IX.

"That the seepage from the Government canals caused ridges of ground water to form directly under such canals (694, 698, 700, 840, testimony), and such ridges restrained seepage from the Carson River and from irrigated lands under the project from entering the Soda Lakes area, which otherwise would have entered the area. (694, 698, 700, and 847, testimony; 680, Lee-Clark report.)

"X.

"That because seepage into the ground water from the Carson River and irrigated lands caused a general rise in such ground water, a backwater effect was produced against the ridges formed by seepage under the

Government canals, forcing considerable of such canal seepage into the lakes area which otherwise would have moved outside of said area. (699, 844, testimony; 680, 684, Lee-Clark report.)

(See Defendant's objections, &c., p. 1119.)

The third requested additional finding of fact is considered by the appellant necessary and material because the Court below in finding number IX (transcript p. 9) found as a fact that appellant's predecessors in interest executed a certain contract and conveyance which fact is irrelevant and immaterial unless this Court should conclude therefrom that the appellant is estopped from claiming damages on account of the taking of its property by reason of construction and operation of the Government's irrigation project. It is considered that the facts established in evidence show that *in law* the alleged contract was a *nudum pactum*, and the deed also was without consideration, and it would be unconscionable for the Government to attempt to make anything out of them.

The remaining requested additional findings of fact are deemed necessary and material because it is considered that the finding of the Court below as to the value of the appellant's property which was destroyed is not warranted by the established circumstantial facts which are relevant and material. There was no witness who testified that the value of the appellant's property which was destroyed was $45,000, and the Court's finding, number XII to that effect (transcript p. 10) cannot be reconciled with any evidence except that relating to a certain compromise settlement between two partners under circumstance which, *in law*, render it incompetent in determining the market value

of the property.

A brief on this motion is filed herewith.

FRANK S. BRIGHT,
Attorney for Appellant.

AFFIDAVIT

District of Columbia, ss:

Personally appeared before me Frank S. Bright, who, being duly sworn according to law, deposes and says that he is attorney for the appellant in the above-entitled cause; that he has read the foregoing motion and understands its contents; that the matters and things therein stated are true in substance and in fact, as he is informed and verily believes; and that in his opinion this motion for remanding the record is well founded in law, is in the interest of justice, and is not interposed for the purposes of delay.

FRANK S. BRIGHT.

Subscribed and sworn to before me this 19th day of September, 1821.

JOHN F. A. BECKER,
Notary Public.

(Seal)

BRIEF

I. STATEMENT OF FACTS.

This action is to recover the market value of certain property of the Natron Soda Company, appellant, herein. The said company owned Big Soda Lake in Carson River Valley, Churchill County, Nevada, and a tract of land surrounding it on all sides. The waters of said Lake were impregnated with sodium-carbonate

Prior to and during the year 1906 the said lake and lands surrounding it were in actual possession of the appellant and its predecessors, who were manufacturing soda from the waters of said lake. This soda was marketed by the appellant, and this product so manufactured and marketed made the lake aforesaid valuable to the appellant.

A plant for the recovery of the mineral contents of the waters of Big Soda Lake had been constructed many years prior to the acquisition of the property by the appellant, and had been improved and added to by it, and was in full operation in the year 1906.

In 1906 the United States Reclamation Service, acting under authority of acts of Congress, constructed the Truckee-Carson Project, consisting of dams, canals, and other structures whereby large quantities of surface waters theretofore confined to the watershed of the Truckee River were in 1906 an during each year since then transported to the watershed of the Carson River. This water, together with surface waters entering the Carson River from its own watershed, were by this irrigation project conserved, controlled, and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes. Among the units comprising this irrigation system is a dam known as Lahontan Dam, and canals known as T line canal, U line canal and N line canal and Truckee canal

with their laterals. Each of said canals passes within two miles of Big Soda Lake except the Truckee canal, and in the neighborhood of the lake their altitude is about 100 feet higher than the lake and about 40 feet higher than Carson River. This irrigation system transports large amount of water through each of said units during the irrigation season of each year, which includes the months of April to September, inclusive, and stores large quantities of water in said Lahontan Dam during every month of each year. In its ultimate development the project contemplates the reclamation of 206,000 acres of land. The canals of the project ramify an area of close to 100,000 acres.

With the advent of the Truckee-Carson project, the body of ground water in the entire section covered by the project rose; the volume of water in Big Soda Lake has continually increased, and the level of said Lake has risen about 19 vertical feet during the period from 1906 to 1916; the recovery of minerals from the waters of said lake is no longer possible; the machinery, vats, houses, and other improvements which constitute the manufacturing plant of the plaintiff have been permanently flooded; the land of the plaintiff immediately surrounding said lake has been inundated, and the value of the property of the plaintiff has been destroyed.

The Court below did not find as a fact whether or not the taking of the appellees property was caused by the said irrigation project, though that fact may be inferred from the other facts found. The Court below found that the appellant's predecessors in interest had executed a certain contract and deed from which it is possible that the inference might be drawn that the Government had secured the right to permit waters of its irrigation project to enter upon the land of appellant.

The Court also found that the value of the property of the appellee which was taken was $45,000, but does not state upon what established facts the finding was based. The claimant in the Court below requested that the Court find said value to be $170,000 and the defendant requested that the Court find said value to be $30,000. The market value of the property is a doubtful one and can be fixed only by a consideration of several circumstantial facts.

II. ARGUMENT.

The petition in brief alleges that by reason of the establishment by the Government of the Truckee-Carson Irrigation Project valuable property of claimant, namely, Big Soda Lake, was submerged so as to make it valueless, and therefore under the principle of the Lynah case (188 U. S. 444) was so taken as to entitle claimant to compensation.

There are three issues in the case: two of fact and one of law. The first issue is: Was the destruction of the value of claimant's property caused by the Government? This is a clear issue of fact. If the injury was not caused by the Government, then, of course, there would be no liability. If it was caused by the Government, then the issue of law would arise as to whether the taking was of such character as to make the Government liable, as in the Lynah case, or whether it was a mere consequential injury for which there could be no compensation, as in the Jackson case. (220 U. S., 1.) If it is found that the taking was of the character that entitles the owner to compensation, then the third issue, which is one of fact, is: The amount of the compensation; that is, the value of the property taken.

z An examination of the findings of fact as made by

the Court of Claims will disclose immediately that there is no finding at all of the Court upon the first and most essential question of fact, and without such finding, or a finding of all the circumstantial facts established in evidence bearing upon said question, the case cannot be presented to this Court. The finding shows (V) that the rainfall upon the surface which drains into Big Soda Lake averages about four inches per annum and is a negligible source of ground water replenishment; that the bottom of the Lake was below the level of the water table and the only known source of water supply was small springs which seeped into the Lake, which springs were supplied by seepage from the Carson River; that (VI) from 1867 to 1906 the level of Big Soda Lake had not raised more than two feet; that is, for practically forty years and up to the very date of the erection of the Government improvement, the level of the Lake had been practically fixed; that (VI) at the beginning of 1906 the operation of the Truckee-Carson Irrigation Project was started by the Government and a large amount of water was transported through the canals of said project around Big Soda Lake; that these canals were much higher than Big Soda Lake. While it is not shown in the findings as made, the evidence shows that there were ten miles of these canals within the drainage area of this Lake. The findings then show (VIII) that with the advent of this project the water in Big Soda Lake, which had been at a fixed level for forty years, immediately started to rise and continued to rise until it was nineteen feet higher than the former level and all of claimant's property was submerged. Yet, there is nothing whatever in the findings of the Court of Claims to show that this was caused by the works of the Government, and in fact finding (V) to which claimant has always strenuously objected and which

is inconsistent with the other findings) gives the inference that there is nothing in the evidence to show that the rise of the water was caused by the Government work. The court states in this finding.

> "Percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move under ground. The slope of the Carson Valley is in a northeasterly direction."

Though the facts can only show one result; namely, that the Government work necessarily caused the rise in the waters of Big Soda Lake, and that there is nothing else which could have caused it; yet the court makes a negative finding that there is nothing to tell how waters move under ground.

The above motion contemplates the finding of additional undisputed circumstantial facts bearing upon the question whether the destruction of the value of claimant's property was caused by the Government. It seems to us that the Court below should have determined that ultimate fact, and appellant requested a finding that the injury was caused by seepage from the canals of the Government irrigation project. However, in view of an error of law by the Court below, any direction to find that said fact should be coupled with an instruction as to the rule of law which is to be applied in considering the evidence. It is hoped that upon consideration of the above motion this Court will in its discretion give both instructions. The motion is in accordance with the practice approved in the cases of *Ripley* v. *U. S.* (220 U. S., 491; 222 U. S., 144), and *U. S.* v. *Pugh* (99 U. S., 265).

It is respectfully submitted that the court below made a fundamental error in considering that this case

presented the question of the *rights* of parties respecting *percolating waters.* The appellee brought into Carson River Valley an immense amount of water-course water from the Truckee River, and transported it at the surface in its ditches to the immediate neighborhood of the appellant's land. As a direct result of the action of the appellee, same of this water-course water so transported has flooded the appellant's land and destroyed its value. It is immaterial whether the water entered the appellant's land by overflow from the appellee's ditches or by seeping from the ditches through the ground. It is not the medium through which the water travels that determines the question of liability, and it is immaterial whether the course of the water in traveling from the ditches to the appellant's land was observed, or hidden and unobserved, so long as the result is certain.

The present decision seems to hold that an individual (and therefore the government) is not liable for flooding the lands of another providing there is no negligence and providing that the excess water accomplishes the taking by seepage underground and not by overflow upon the surface.

The percolation in this case was artificial, and it is well established in decisions of the courts that recovery may be had for injury caused in such a case, without regard to whether there was negligence.

The rule that the rights of parties to percolating waters will not be subjected to regulations of law has been qualified in later cases, but artificial percolating is not within the rule and in this case artificial percolation was set in motion by the diversion of surface streams and the rule of law governing water-course waters applies.

See 30 Am. Eng. Encycl. Law, pp. 314, 321 and 322 and cases therein cited.

The ultimate fact whether the appellant's property was destroyed by the irrigation system of the Government is dependent upon circumstantial facts alone. Some of those facts have been set forth in the findings of fact while others, which the appellant believes are just as material, and which have been fully established, and upon which there was no conflict of evidence, have been omitted.

The apellant requests a review of the conclusion of the court below as to the legal effect of the circumstantial facts and conceives it necessary that all of said facts which are established in evidence shall be set forth in the findings of fact.

We do respectfully, but earnestly, contend that there is a mass of uncontradicted and undisputed evidence in this case showing how underground or percolating waters are governed, and how they move underground, and what was the direction of such movement in the immediate vicinity of Big Soda Lake. The facts established by this evidence clearly show that the first and second requested additional finding of fact are fully warranted. A reference to some of said evidence supporting the first and second requested additional findings follows:

In the report of Messrs. Haehl and Forbes (Pltfs. Ex. "Forbes No. 1") it is stated:

> "The usual sources of underground water in any valley are seepages from local precipitation and from streams which traverse the porous materials of the valley fill. The water thus contributed passes downward, if it encounters no impervious stratum, and establishes a zone of saturation above the rock bottom of the valley. Groundwater bodies are seldom stagnant, but under the influence of gravity and against the frictional re-

sistance of the materials of the valley fill, maintain a slow movement from their source toward some lower point of escape. The surface of the zone of saturation is termed the ground-water table, and it assumes a slope or gradient in the direction of its movement, the rate of movement in homogenous material being greater in the direction of greatest slope. In general the ground-water slope or 'gradient' will conform to the relief of the ground surface, although the gradient is usually less than the surface slope." (1007).

D. W. Cole, a witness for the government, testified that the universal law of gravitation is the only thing that moves water, except perhaps such minor influences as capillary attraction and evaporation; that the movement of water through soils is retarded to a greater or less extent by the character of the soils. (486).

The same witness also testified that underground water "is dependent primarily, as I said before, on the law of gravity, that is, water, either in a stream or in the ground, will seek to go toward the center of the earth unless there is some interference to prevent, deflect, or retard such movement." (503).

The same witness testified that "the ground-water of the country most probably originates in the streams which flow into that section, either as rivers or canals, or as water put upon the surface for irrigation. That is undoubtedly the source of that water." (524).

E. G. Hopson, a witness for the government, testifield that underground water gravitates along the line of greatest declivity. (386, 437).

Joseph Jacobs, also a government witness, testified that, all other things being equal, the ground waters would tend to move in the direction of the greatest declivity. (614).

Defendant's witness E. G. Hopson testified that the

level of the lakes is below that of the ground-water plane and the movement is into the lakes from said plane in all directions (405, 412).

The same witness also testified that the contour lines of the ground-water plane on plate 4 of the "Defendant's Exhibit No. 1" show a drop of 40 feet in 1¼ miles immediately surrounding the lakes (436). The same witness testifies that the greatest declivity is on the west side of the lake (396 to 399).

The report of Hopson, Cole & Jacobs, ("Defendant's Exhibit No. 1"), states that because of the lake depressions the water table is distorted and drawn down from all directions towards and into the lakes, with, however, the greater hydraulic head obtaining on the south side (630). And that the present drainage area tributary to the Soda Lakes is approximately the "Soda Lake Area" of 4,852 acres, the boundary of which is practically fixed by the location of local ground-water sources, namely, the T, U and N canals (675).

Witness Clarence L. Anderson testifies that immediately surrounding the lakes on all sides there is a general declination towards the lakes (264).

Defendant's witness, W. O. Clark, testifies that, as shown on Government's Exhibit, "Clark No. 2," the slope of the water table in the immediate vicinity of the lakes is towards the lakes from every direction (696).

Witness C. H. Lee, for the defendant, testified that the velocity of movement of ground-water is controlled by several factors; that it does not move rapidly through very fine materials; that it moves more freely through sand than through clay; that mixtures of silts with sand tends to reduce the rate of movement; that fine particles tend to obstruct the rate of movement through coarser sand; that fault planes are often encountered in rock substance in which clay exists, and water will often be found moving on the upper side of

such clay layers, in the open fractures of the rock with more or less rapid movement; that in alluvial material the movement is very slow as compared with the movement through cracks and fissures in hard crystalline rock (834, 835).

The report of Lee and said Clark, (Defendant's Exhibit, W. O. Clark, No. 1), states it is to be fact that part of the water from the T, N and U canals has reached the lakes and been lost in evaporation (680).

The porosity (void spaces) of the soils surrounding the Lakes was testified to by several witnesses. Haehl and Forbes, witnesses for the plaintiff, stated it to be from 20 per cent to 40 per cent and averaging 25 per cent (911, 912, 932, 1013, 1024).

Tests made by Forbes and Haehl of material out of this mass showed 21.1 per cent, 22.2 per cent, 27.4 per cent and 35.9 per cent (1013, 1024).

In the report of Hopson and Cole and Jacobs, *supra*, it is stated that the soils contain about 33 1/3 per cent porosity (628, 631, 632).

Witness Hopson testified that the above estimate was based upon actual tests (442).

Messrs. Lee and Clark in their report, *supra*, estimate the porosity at from 35 per cent to 40 per cent (682).

Based upon the above evidence and other evidence of the same purport, the claimant asked for a finding as follows:

> "That percolating waters are governed by the same hydraulic laws as surface waters, they move underground through the interstices between the particles of sand, clay and other character of soil immediately below the surface of the earth in the neighborhood of Big and Little Soda Lakes, and that such movement is through cracks and crevices, between such impervious strata as exist and

along a plane known as the ground-water level. That the law of gravitation, the sizes of the crevices and the frictional resistance caused by the particles around which the water must pass are dominating factors in determining the movement of said underground waters, and position and direction of the ground-water level.

"The general movement of these ground-waters follows the slope of the Carson Valley and is in a northeasterly direction, though, in the immediate vicinity of the lakes, in what is termed the Cone of Influence of the Soda Lakes, owing to the fact that the water level of the Lakes is lower than the surrounding ground-water level, there is localized water slope from all sides into the Lakes, and the movement of these latter waters is more rapid than is the general movement northeasterly." (See joint Request for Finding of Fact pps. 5-6).

The Government accepted said proposed finding of fact with only slight modifications (which are unimportant) as follows:

"X"

"Defendant objects to the words 'immediately below the surface of the earth in the neighborhood of the Big and Little Soda Lakes,' as unsupported by the testimony; the testimony does not show the condition to be different there than elsewhere as the statement indicates, nor that the waters are 'immediately' below the surface. The whole clause should be eliminated.

"Defendant objects to the words 'Cone of influence of the Soda Lakes,' for the term as applied by the different engineers had different meanings (1023 Haehl-Forbes report), and we ask that the following words be substituted: '*drainage area of the Soda Lakes areas consisting of about* 4,500 *acres.*' (682 Lee-Clark report; also see Notron Soda Company's request No. V.)

"Defendant asks that after the words, 'owing to the fact that the water level of the Lakes,' in the fourth paragraph, there be added the words '*due to evaporation*' (679). As the sentence now stands, the inference is that the level of the Lakes is not governed by the level of the ground-waters of the area. (Haehl-Forbes report, 1008.)" (See p. 1112 of "Defendant's Objection.")

The report of Lee and Clark, *supra*, states that the drainage area tributary to the Soda Lakes "is practically fixed by the location of local ground-water sources, namely, the T, N and U Canals" (675). In the same report the result of the evaporation from the surface of the Lakes (4 feet per annum) is likened to the operation of a pump in a well, producing a draft. The report states that "When a pump commences to operate in a well the water in the well is at once lowered, thus leaving the water level outside the well higher than that in the well. This sets up a movement of groundwater into the well and establishes a slope of the water table toward the well from all directions" (679).

The report states that seepage from those canals also formed ridges of water which inhibit other waters from entering the area, and said ridges form the boundaries of the drainage area into the Lakes (674, 675, 680, 683).

The testimony of said witness C. H. Lee and the testimony of said witness W. O. Clark is to the same effect (697, 698, 699, 776 to 781, 840, 841, 843, 844, 871, 872, 873).

The report of Lee and Clark,*supra,* shows that the seepage into the drainage area of the Soda Lakes from the T, N and U canals during the period from 1906 to 1915 was 30,103 acre feet (683, 684). The level of the Lakes during that same period rose about 15 vertical feet (705). And said witness E. G. Hopson estimated that that aggregates about 4,800 acre feet (431, 432) or less than started towards the Lakes from the T. N and U canals within the drainage area of the Lakes during the first two years of the project.

Not only so, but the testimony of Lee and Clark and the report of those witnesses are to the effect that after making deductions for all the water which is inhibited from entering the drainage area of the Lakes due to the back-water effect of the ridges under the canals of the project, from 66 per cent to 74 per cent of the increase of waters in the drainage area of the Lakes are seepage waters from the T, N and U canals (683, 684, 685, 775 to 789, 845).

The evidence is to the effect that Truckee River water was turned into main canals for irrigation purposes on August 15, 1906 (623), and that 1906 was the last year of actual manufacture of soda on Big Soda Lake (623). The evidence of W. R. Streeper is to the effect that in 1907 the principal work done on the Lakes was the raising of levees, trying to keep water out of the vats (137, 138). Thos. H. Means, the engineer in charge of the Project, reported, January 28, 1909, that "during the last three years the Lake has been raising. It has raised so much that Mr. Griswold finds it impossible to maintain these levees, and as there is no more ground on which these tanks could be built his business

of soda-making at the Lake is *ruined* (635).

It is considered that finding of fact number nine of the court below (transcript p. 9) is misleading and susceptible of significance which is not warranted by the facts upon which said finding was based, and that it is possible that the court might be misled thereby. We submit that the contract referred to was a *nudum pactum* and does not warrant any deductions adverse to the plaintiff, and that it is unconscionable for the defendant to attempt to make anything out of it.

If the appellant is foreclosed from its remedy because of the contract and deed the situation is analgous to the story of the camel which was allowed to get its nose in the tent. The government secured a right of way over a small part of claimant's land in consideration of alleged benefits to be secured from the construction of an irrigation system. Thereafter the government proceeded to construct an irrigation system which resulted in the taking of the entire tract under the guise of said alleged "benefits."

There is no evidence in the record that the appellant or its predecessors in interest were promised, or that they derived or received any benefits whatever from the construction of the irrigation works, or how they were to be benefited; and there is no evidence that there was any other consideration promised or received for the execution of said contract. The only testimony in the record concerning the clause in the contract which is quoted in finding number nine is the deposition of Eugene Griswold, who denies that he ever saw such a statement in the contract. The claimant merely gave to the government without any consideration whatever so much land as it might require for the construction of ditches and the right to enter his land to construct them (304-5), and that is all there is to the contract or

deed. There is no evidence that any damage resulted or has been claimed by the appellant on account of the use of the land in constructing any ditches or the survey of the land for that purpose or in the construction of any of the ditches. There is no evidence that the line of survey had been run when the contract was executed and it is not shown in evidence that Griswold knew where the ditches would run. The Government could have acquired by condemnation proceedings a release of any consequential damages to other parts of the tract due to the operation of the irrigation system, and if there was in contemplation on the part of the Government the avoidance of liability for damages on account of any taking or destruction of the valuable plant of the plaintiff, in procuring him to sign said contract and deed a fraud was perpetrated which in good conscience this Court should refuse to enforce.

The finding of fact number twelve of the court below (transcript p. 10) is not considered to be warranted by relevant circumstantial facts which are established in evidence.

Plaintiff requested court to find that the value of its property, which had been destroyed, was $140,000. The defendant requested that the amount be fixed at $30,000, on the ground that Griswold, (one of the two owners of the capital stock of the corporation) had purchased his partners interest for $15,000. If the court based its conclusion upon said sale the court erred because the evidence clearly shows that said sale was a *compromise settlement between two partners*, after a suit had been instituted, and that while Griswold only paid $15,000 *in cash* the business was in his debt to an amount not stated and he also parted with "other considerations," the nature or value of which is not shown in evidence. (Rec. pp. 302, 997). It is submitted that

said transaction is not competent evidence to be considered in determining the *market value* of the property.

The measure of compensation which should be paid for property taken is the fair market value—the price which would be procured by a prudent seller, at liberty to fix the time and conditions of sale. Manifestly a compromise settlement of a suit between partners affords no criterion of the market value of the property which is the subject of the suit.

See 10 Am. & Eng. Encycl. Law, pp. 1151-2 and cases there cited.

It is considered that the actual market value of the property which was destroyed is somewhat in doubt and depends upon circumstantial facts but that the conclusion of the court below is manifest inadequate and the plaintiff requests that the conclusion of the court below, based upon these facts, be reviewed. The factors entering into the question of market value of plaintiff's property which was destroyed, as shown by competent evidence, are as follows:

Russell estimated that there were 528,000 tons of sodium-carbonate in the lake in the 80's. Less than 28,000 tons have been taken out since then (Defendant's Ex. Clark No. 6, p. 80.) Evidence was introduced showing that soda can be manufactured at a cost of from $12 to $16 per ton (279, 283, 290, 993) and could be sold at from $22 to $30 per ton. In 1906 and 1907 the cost of manufacture and transportation was about $12.25 per ton and the soda brought from $22 to $25 per ton. (37, 139, 140, 144, 289, 290, 993).

In 1906 the cost of transportation was lowered by virtue of the establishment of a more accessible railroad shipping point (36, 37) and the carbonating process had been perfected whereby production was ca-

pable of being increased enormously, rendering the property very much more valuable. (290 to 293, 299, 300, 991, 992, 997).

The evidence indicates that the plant already constructed was capable of yielding about 500 tons per annum (283) under the old process and the report of Chatard was to the effect that the lake should produce more than twice that much annually. (Ex. Wrinkle No. 1, pp. 4 to 52, 58.) This, without taking into consideration the improvements referred to above. On the basis of its income producing value, therefore, the property was worth more than $140,000.

On the basis of the cost of reproduction the uncontradicted evidence is that the improvements were worth $65,461 (281,998,101), which does not include the land, or the value of Soda Lake itself, which is the principal property involved, and that which makes the other units useful. If the Lake is not worth $140,000, certainly the Lake and $65,000 worth of improvements and the land were worth that much in 1907.

On the basis of actual cost, the property was worth considerable. The construction of the vats cost prior to 1892 in excess of $40,000. (292). The carbonating furnace cost $13,000 to $15,00 (290) and the reverberating furnace cost about $2,000. (294).. The houses cost about $1,500 (295) and the concrete pipe line cost $15,000 to $20,000 (292), making a total of more than $73,500 without counting the cost of any of the land, of many of the improvements referred to in the testimony, the cost of three years experimenting to get chloride or sulphate of potassium (282), and four years experimenting to get a sufficient and successful carbonating apparatus. (290). This is all in addition to the value of the Lake. Mr. Griswold estimated the value of the business to be $100,000 or more (295).

On the whole, it is submitted that the claimant has

made a showing which fully warrants a valuation of at least $140,000 upon the property appropriated by the government, which included the Lake itself and the land surrounding it upon which were the improvements referred to above.

The government offered no evidence as to the value of the said property.

CONCLUSION

It is respectfully submitted that the order herein prayed for should be granted.

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